Supreme Court, U.S.
FILED
JUL 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

89-55

No. _____

In The

Supreme Court of the United States

October Term, 1989

CAROL L. PETTYJOHN,

Petitioner,

vs.

KALAMAZOO CENTER CORPORATION
d/b/a/ KALAMAZOO HILTON INN,
a Michigan Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

ISSUE:

WHETHER FEDERAL COURTS IN DIVERSITY OF CITIZENSHIP CASES ARE TO USE STATE SUBSTANTIVE LAW RATHER THAN THE FEDERAL RULES OF EVIDENCE TO MAKE DETERMINATIONS ON THE RELEVANCY AND ADMISSIBILITY OF EVIDENCE?

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The Plaintiff/Appellee, Carol L. Pettyjohn, herein Petitioner, through John Conlon & Associates, P.C., by John Conlon, Esq., prays issuance of a Writ of Certiorari to the Sixth Circuit Court of Appeals from the Judgment entered on the 28th day of February, 1989, the order of the Sixth Circuit Court of Appeals denying Petition for Rehearing En Banc entered on the 12th day of April, 1989, and the Judgment of the Sixth Circuit Court of Appeals issued as a mandate on the 20th day of April, 1989.

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals bearing Docket No. 87-1513 was submitted for full text publication. It is appended below as Appendix "A". The order of the Sixth Circuit Court of Appeals, bearing the above-referenced docket number and denying both the request for hearing en banc and relief is appended below as Appendix "B". The Judgment of the United States Court of Appeals for the Sixth Circuit entered as a mandate on the 20th day of April, 1989, is appended below as Appendix "C". The underlying Judgment of the U.S. District Court for the Western District of Michigan, Southern Division, bearing docket number K83-352-CA4, is appended below as Appendix "D".

STATEMENT OF JURISDICTION

The U.S. District Court for the Western District of Michigan, Southern Division, entered Judgment in the favor of the Plaintiff, based on jury verdict, on the 17th

day of November, 1986. On appeal to the U.S. Court of Appeals for the Sixth Circuit at Cincinnati, Ohio, an order reversing and remanding the case to the U.S. District Court for the Western District of Michigan for retrial was entered on the 28th day of February, 1989. A rehearing en banc, on the issue brought before this Court, was denied by order of the Court entered on the 12th day of April, 1989.

The jurisdiction of the United States Supreme Court for issuance of Writ of Certiorari is invoked pursuant to 28 USC Sec 1254(1), as authorized pursuant to US Const. Art. No. 3, Sec. 2, Cl. 2.

FEDERAL STATUTORY LAW INVOLVED

The United States Congress passed Public Law 93-595 on January 2, 1975, and it became effective July, 1975. It provides in pertinent part, as follows:

Rule 101 Scope

"These rules govern proceedings in the courts of the United States and before the United States magistrates, to the extent and with the exception stated in Rule 1101."

Rule 1101 Applicability of Rule

"(A) Courts and magistrates. These rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court of the District of the Canal Zone, the United States courts of appeals, the Court of Claims, and to United States magistrates, in the actions, cases, and

proceedings, and to the extent hereinafter set forth. ***

(B) Proceedings generally. These rules apply generally to civil action and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under the Bankruptcy Act."

Pub. L. 93-595, Jan. 2, 1975; 88 Stat. 1929.

CASE OVERVIEW

ODE DE CLERK

May I have your attention, Most Honorable Clerk. The case presented is a problem worse than a quirk.

That it happened is too unbelievable to be true. It's effect will make the entire trial bar cuckoo.

The matter at issue is of everyday concern. It will make trial judges and trial attorneys have to unlearn.

Of evidence and on admissibility, it does rest. Its confusion it will bring to even the best.

On federal evidence, the Congress has legislated. On following its mandate, the Sixth Circuit has obviated.

No longer are the federal courts unequivocally bound. By the rules of evidence that Congress found.

On the admissibility of evidence the Court of Appeals has rewritten the book. The United States Supreme Court had better take a look.

In diversity actions, we now begin. On the admissibility of evidence, state law is now in.

The holdings of the Supreme Court have been overturned. The directives of the Congress might as well be burned.

The case has been published both near and far. A rehearing en banc did not go very far.

Its holding will frequently be cited hereinafter. The problems created will be greater than the laughter.

The opportunity to correct the record is now at hand. Practitioners and trial judges will be at peril if left to stand.

Importance of the subject matter should not cause you to tarry. The courts in the other circuit have held the contrary.

The problem is of importance to the nation-wide bar. It is almost impossible to have gotten this far.

To avoid the obvious which will be gorey. The United States Supreme Court must grant certiorari.

STATEMENT OF FACTS

Carol Pettyjohn sued the Hilton Hotel at Kalamazoo because the accommodations provided were unsafe and caused her to sustain permanent injuries. The case was tried before a jury. One of the jurors, a hotel industry employee, Ms. Connie Harris, who worked for the Presidential Arms Hotel, was allowed by Plaintiff to sit and deliberate on the case. A unanimous jury, on September

25, 1986, returned a verdict in favor of Plaintiff. It found that the Hilton Hotel accommodations were unsafe and that Plaintiff sustained permanent arm injuries and lost the effective use of her dominant arm and hand. They found that she suffered that loss on August 19, 1980, when injured at the hotel. The problems continued seven (7) years later when the case was submitted for deliberations and determination.

The Hilton Hotel refused the decision and verdict of the jury. It moved for Judgment N.O.V. It moved for a New Trial. It filed its appeal on the 4th day of June, 1987, after the trial court denied all requests for post-judgment relief. The appeal was argued in the Sixth Circuit Court of Appeals on September 22, 1988. The Defendant/Appellant made a broad-based attack on all aspects and parts of the proceedings in the U.S. District Court for the Western District of Michigan. It only aroused sufficient interest of the Sixth Circuit Court of Appeals on a singular relevancy/admissibility of evidence issue.

The trial judge ruled that evidence of a prior and somewhat similar accident in the same Hilton Hotel in 1978, approximately two (2) years before the Plaintiff sustained her injuries, and the notice to the hotel about that accident was admissible for the limited purpose of notice. It was determined to be notice of the defective, dangerous, and unsafe condition.

The issue was first argued at the trial before the taking of testimony. It was then re-argued on the Defendant's Motion for Directed Verdict. Again, it was re-

argued on the Defendant's Motions for Judgment Notwithstanding Verdict and New Trial. The trial judge carefully considered offers of proof. Later, all the evidence presented was considered. As a matter of discretion, it ruled that the evidence could be considered by the jury for that limited purpose.[1]

The Court of Appeals panel which heard the case seized on this admissibility of evidence ruling as its singular basis for reversal. It struck down the lower court jury verdict and judgment. It reversed and remanded the case for a new trial. Now comes the rub! The Court of Appeals made its evidentiary determination based on Michigan evidentiary law. It held that the trial court incorrectly interpreted and misapplied Michigan law on the admissibility and relevancy of evidence about the prior accident.[2] This is a diversity of citizenship case. It is a federal court case!

A petition was filed for rehearing en banc. The attention of the Sixth Circuit Court of Appeals was directed to the fact that the decision stands for the proposition that state laws control issues of relevancy and admissibility in diversity actions tried in the federal courts. This case was

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[1] The Plaintiff sought to have the evidence admitted for consideration by the jury as evidence of negligence, and the Defendant sought to have the evidence totally excluded. The trial judge ruled that it would be admissible for the limited purpose of indicating the notice to the Defendant about the dangerous and defective condition of their premises.

[2] "We believe that the district court incorrectly applied *Freed v. Simon* 370 Mich 473 (1963), ***. Freed does not stand for such proposition. Under Freed, Oehmke's testimony is clearly irrelevant." *Pettyjohn v. Kalamazoo Center Corp.* No. 87-1513.

submitted for full text publication. Its holding is contrary to holdings in other circuits and contrary to the Act of the United States Congress mandating that Federal Rules of Evidence control in federal court proceedings. The issue involved is of significance and importance to nationwide federal jurisprudence. However, the request for rehearing en banc was denied! The clearly erroneous holding stands in contradiction of the general holdings throughout numerous other circuits of the United States Court of Appeals. It is in disregard of the legislative directive of the United States Congress.

This Petition for Writ of Certiorari, from the Judgment and the Order of the U.S. Circuit Court for the Sixth Circuit on Rehearing en Banc, must be granted or confusion will reign. It will mislead trial attorneys and judges. The conclusion it gives is that they are to apply state law standards on the relevancy and admissibility of evidence in diversity actions. It is likely to lead to substantial injustice, the unfair administration of legal proceedings, the creation of unjustifiable expenses and delay, and promote the growth and development of erroneous interpretations on what law to apply for rulings on evidentiary matters. All of this is contrary to the intended ends and objectives of the Congress in enacting Public Law 93595.

The issue involved is simple and uncomplicated! It has significant and long-range consequences. They can be obviated by the United States Supreme Court through the definitive ruling sought by the Plaintiff. It must take the case and hold that the Federal Rules of Evidence, and not the state laws on evidence, are to be applied in litigation in the Federal Courts.

LEGAL ARGUMENT

THE FEDERAL COURTS IN DIVERSITY OF CITIZENSHIP CASES ARE TO USE THE FEDERAL RULES OF EVIDENCE AND NOT STATE SUBSTANTIVE LAW WHEN MAKING DETERMINATIONS ON THE RELEVANCY AND ADMISSIBILITY OF EVIDENCE.

This is a personal injury case. It is travelling through the federal court system because the Plaintiff Carol Pettyjohn was a citizen of New Hampshire and the Defendant Hilton Hotel was a Michigan Corporation in August, 1980, when she was injured and lost the full and effective use of her dominant hand and arm. It is not a big money case. The jury verdict was for a mere fifty-eight thousand five hundred dollars ($58,500.00) for the permanent loss of the full and effective use of her dominant hand. However, it is an extremely important case from the standpoint of federal diversity litigation. It has rewritten and overruled established federal evidentiary law. It should not be allowed to stand! In its present context, it adds to a common misunderstanding of how and when the substantive law of a state is applied in a diversity action. It emasculates the Federal Rules of Evidence.

An admissibility of evidence question is the singular issue creating controversy. The holding by the Sixth Circuit Court of Appeals gives credence to a misbelief that the doctrine of *Erie v. Tompkins* 304 US 64; 58 S.Ct. 817; 82 LEd 118 (1938) requires the application of state law indiversity cases on evidentiary issues when there is state case law on point.[3]

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[3] The Defendant/Appellant Hilton Hotel asserted on appeal that Michigan law would exclude evidence of prior

(Continued on following page)

The misconception and misunderstanding of federal law is pervasive. The Sixth Circuit Court of Appeals has proclaimed its misunderstanding and misinterpretation! It has added to the confusion and misunderstanding about the doctrine of *Erie v. Tompkins*, as well as the effect and application of the federal rules of evidence in diversity actions on issues of relevancy and admissibility of evidence. The domino effect is rolling ever onward! Only the United States Supreme Court can set the record straight.

The trial judge, on remand, has been directed by the Court of Appeals to make evidentiary determinations based on state law, when there is state case law pertaining to the matter at issue. There will be built in reversible error if the trial judge applies the wrong law on the issue that was the basis for reversal. It leads to this petition! We are dealing with a runaway train and only the U.S. Supreme Court, through issuance of a Writ of Certiorari, can apply the brakes.

The issue before this Court deals with the relevancy and admissibility of evidence. The applicable rule of evidence in federal court proceedings is FRE 401. It states in pertinent part as follows:

> "*** evidence having any tendency to make the existence of any fact that is of consequence to the deter-

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(Continued from previous page)

accidents for the purpose of showing notice. It unequivocally claimed that because diversity of citizen was the basis of jurisdiction, state evidentiary law is to be applied. Brief of Defendant/Appellant, p. 20, footnote 1.

mination of the action more probable or less probable than it would be without the evidence."

An issue of relevancy is to be determined by the trial judge based on his or her experience, judgment, and knowledge of human motivation and conduct. *United States v. Williams* 545 F2d 47, 50 (8th Cir 1976). The trial court determined, on different occasions, that the evidence was relevant to show notice. The admissibility of relevant evidence is set forth in the Federal Rules of Evidence, which provides that "all relevant evidence is admissible, except as otherwise provided *** evidence which is not relevant is not admissible." FRE 402. The trial court has great latitude when ruling on the admissibility of evidence. Its rulings are to be upheld unless there is a clear abuse of discretion. *U.S. v. Ashle* 555 F2d 462, 465 (C.A. 5th, 1977), cert denied 434 US 869; 98 S.Ct. 210; 54 LEd2d 147. The proceeding citation sets out federal law on the issue of relevancy and admissibility of evidence.

What makes the Federal Rules of Evidence on relevancy and admissibility applicable and controlling in a diversity action? The intended scope of the Federal Rules of Evidence is stated in FRE 101. They were enacted by Congress to govern litigation in the courts of the United States. In *Kingsley v. Baker/Beechnut Corp.* 546 F2d 136, 140 (5th Cir 1977), it was held the Federal Rules of Evidence govern the admissibility of documentary evidence in federal diversity cases.

The Federal Rules of Evidence are unique and distinct within the concept of federal practice and procedure. They were not enacted pursuant to the Rules Enabling Act, which is 28 USC, Section 2072. They are a

specific Act of Congress and are identifiable as Pub. L. 93-595; 88 Stat. 1929. There is not substantive procedural limitation applicable to the Federal Rules of Evidence, as is found in other rules of practice and procedure adopted by the United States Supreme Court pursuant to 28 USC, 2072. *Boggs v. Blue Diamond Coal Co.* (1980 ED Ky) 497 FedSup 1105; 30 FRServ2d 1.

On the other hand, some of the Federal Rules of Evidence require a specific deference to state law, in diversity cases, on such matters as presumptions, as provided by FRE 302, privileges, as provided by FRE 501, and competency, as provided by FRE 601. These rules call specifically for the application of state law, when state law provides what is called the rule of decision. The issues in dispute do not pertain to any of those sections. Therefore, only the Federal Rules of Evidence are to be applied.

In diversity cases, the Federal Rules of Evidence generally govern the admissibility of evidence. *Johnson v. Ellis & Sons Ironwork* 604 F2d 950, 957 (5th Cir. 1979). The Fifth Circuit Court of Appeals has been active on this issue. In reviewing a district court exclusion of certain evidence, it said that even though it was a diversity action the Federal Rules of Evidence governed the admissibility of that evidence. *Ballou v. Henri Studios, Inc.* 656 F2d 1147, 1153 (5th Cir. 1981).[4]

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[4] This case and *Garwood v. International Paper Co.* 66 F2d 217, 223 (5th Cir. 1982), were cited by *Pettyjohn* at p. 11 of Brief of Plaintiff/Appellee on Appeal.

The issue of applying state law to evidentiary matters was raised by Petition for Writ of Certiorari in a case out of the Seventh Circuit Court of Appeals in 1983. *In re: Air Crash Disaster near Chicago, IL* 701 F2d 1189, 1193 (7th Cir. 1983), cert denied U.S.; 104 S.Ct. 204; 78 LEd2d 178. That court said the Federal Rules of Evidence were unique because they are a statutory enactment, i.e. Pub. L. No. 93-595; 88 Stat. 1959 (1975). The Seventh Circuit Court of Appeals held that the supremacy clause of the United States Constitution and the Rule of Decision Act, 18 USC Sec. 52 (1976) compels their application in federal court proceedings. This is also consistent with 28 USC Sec. 2076. It declares that Congress is invested with full power and control over the rules of evidence. The Supreme Court of the United States has the power to prescribe amendments to the Federal Rules of Evidence. However, they cannot take effect until reported to Congress by the Chief Justice. They do not take effect if disapproved by either house of Congress. Additionally, any rule, whether proposed or enforced, can be amended by Act of Congress. 28 USC Sec. 2076.

The Seventh Circuit Court of Appeals supported its interpretation and holding, that the Federal Rules of Evidence govern the admissibility of evidence in diversity cases, by citing numerous cases from differing jurisdictions. Some of these authorities are as follows: *Pollard v. Metropolitan Life Insurance Co.* 598 F2d 1284, 1286 (3rd Circ. 1978), cert denied 444 US 917; 100 S.Ct. 232; 62 LEd2d 171 (1979); *Gibbs v. State Farm Mutual Insurance Co.* 545 F2d 423, 428, n.2 (9th Circ. 1976); *Croce v. Bromley Corp.* 623 F2d 1084, 1094 (5th Circ. 1980), cert denied 450 US 981; 101 S.Ct. 1516; 67 LEd2d 816 (1981). The clear

pronouncement of these and other cases is that the Federal Rules of Evidence control when the relevancy and admissibility of evidence is at issue. *McInnis v. AMF, Inc.* 765 F2d 240, 244-246 (C.A. 1st 1985). The opinion of the *McInnis* case on the Federal Rules of Evidence is stated in pertinent part as follows:

> "Congress's authority to prescribe such rules, even though they may differ from comparable state rules, has long been recognized. *Hanna v. Plummer* 380 US 460, 461, 463; 85 S.Ct. 1136, 1144-1145; 14 LEd2d 8 (1965) ***.
>
> Congress clearly intended that the FRE would apply to diversity actions. The FRE 1101(b) applies generally to civil and criminal proceedings. This conclusion is underscored by the fact that where Congress deemed it desirable for the state rules to be applied in diversity actions, it created a special proviso to that effect in the federal rules. *** The question remaining is whether the evidence *** was properly admitted under FRE 403 ***. We are bound by the trial judge's ruling of admissibility unless defendant can demonstrate that he exercised his discretion arbitrarily or irrationally."

In addition to the Supreme Court's comments in *Hanna v. Plummer,* supra, on the authority of Congress to prescribe the Federal Rules of Evidence, even before its enactment in 1975, the Supreme Court recognized the limitation on its power to judicially set the rules on matters governed by the federal Constitution or the acts of Congress. *Walker v. Armco Steel Corp.* 44 US 740; 64 LEd2d 659; 100 S.Ct. 1978, 1982 (1980). The power of the Congress to preempt even the Supreme Court is spelled out in 28 U.S.C. 2071. This law declares the limits of the federal court. It

requires them to make rules consistent with acts of Congress.

CONCLUSION

The Sixth Circuit Court of Appeals has erroneously held, in its opinion submitted for full publication, that the relevancy and admissibility of evidence is to be determined under state law rather than the Federal Rules of Evidence. The holding is in direct conflict with the decisions of other circuit courts of appeal on this issue. The Court of Appeals for the Sixth Circuit has decided this important question of federal law different than other circuits. This issue has yet to be addressed specifically by the United States Supreme Court. Because of its importance to federal jurisprudence in diversity of citizenship actions, the United States Supreme Court should become involved and exercise its power of supervision to clearly and definitively settle this issue.

RELIEF REQUESTED

WHEREFORE, your Petitioner prays this Court to grant its petition for issuance of Writ of Certiorari, conduct a full review of the issue involved, reverse the judgment of the United States Court of Appeals for the Sixth Court, remand the case to the U.S. District Court for the Western District of Michigan with the jury verdict and judgment reinstated and affirmed, and allowing taxable costs to the Plaintiff-Appellee. That the United States Supreme Court

may grant any and all other relief to which Petitioner is entitled and as authorized pursuant to 28 USC 2106.

Respectfully submitted,

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APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 87-1513

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CAROL PETTYJOHN, *Plaintiff-Appellee,* v. KALAMAZOO CENTER CORPORATION d/b/a KALAMAZOO HILTON INN, a MICHIGAN CORPORATION, *Defendant-Appellant.*	)	ON APPEAL from the United States District Court for the Western District of Michigan

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Decided and Filed February 28, 1989

Before: MARTIN, and NELSON, Circuit Judges; and EDWARDS, Senior Circuit Judge.

BOYCE F. MARTIN, Jr., Circuit Judge. Kalamazoo Hilton Inn appeals the improper admission at trial of the deposition testimony of Thomas Oehmke explaining the circumstances of a prior slip and fall at the Hilton in 1978 told to him by Dr. Feuer. Kalamazoo Hilton objects to Oehmke's testimony principally as both hearsay and irrelevant for the purpose of showing notice of a dangerous condition which allegedly resulted in Pettyjohn falling in a combination shower and bath unit.

Carol Pettyjohn stayed at the Kalamazoo Hilton on August 19, 1980 where she slipped and fell in a shower and bath tub which contained adhesive strips on the bottom of the tub but no side rails or towel racks. There was a ledge towards the front of the stall where soap was placed. When Pettyjohn reached up to put the soap along the ledge of the tub, she fell. She struck and injured her left arm and hit her head.

At trial, Thomas Oehmke, the attorney for a Dr. Feuer in a previously settled slip and fall claim against Hilton in 1978, testified on deposition to the facts surrounding the fall of Dr. Feuer and the condition of the shower in 1978 as told to him by Dr. Feuer.

The district court denied Hilton's motion in *in limine* to strike or exclude the deposition testimony of Thomas Oehmke as irrelevant testimony of a prior dissimilar accident and held that the deposition testimony was relevant and admissible. The district court further stated that Hilton has waived its objections to Oehmke's testimony on hearsay grounds since the testimony was given in response to Hilton's questions, even though Hilton had a continuing objection as to the relevancy of Oehmke's entire testimony. At trial, Hilton renewed its objections as to the hearsay nature of Oehmke's testimony. The court again overruled the same objection stating that Oehmke's testimony was not being used for the truth but to show that Dr. Feuer gave information concerning his fall to Oehmke.

Hilton argues that Oehmke's testimony regarding the accident of Dr. Feuer was inadmissible because Oehmke's testimony was not relevant to show notice of an unsafe

condition in the shower/tub at Hilton since the district court had found that Dr. Feuer's accident was dissimilar to the later accident of Pettyjohn. *Freed v. Simon*, 370 Mich. 473 (1963). Hilton also claims that Oehmke's testimony relating Dr. Feuer's explanation to Oehmke of his accident was hearsay.

We believe that the district court incorrectly applied *Freed v. Simon*, 370 Mich. 473 (1963), which states that evidence of prior accidents *at the same place* and arising from *the same cause* is admissible to show defendant's notice or knowledge of the defective or dangerous condition alleged to have caused the accident *and* to show the defendant's negligence on the theory that defendant, having notice or knowledge of the defect, is held to a higher standard of care. *Id.* at 475. At trial, the district court ruled that the two accidents were not similar:

> The court cannot say that given the potential for confusion of a jury in listening to conditions of the prior accident and given the dissimilarities of the conditions which gave rise to each of these accidents, and given the time span involved, two years, . . . the court is of the opinion that the two accidents are not sufficiently similar that the testimony should be used as evidence of negligence. . . .

In jury instructions, the district court informed the jury that the jury could not consider Oehmke's testimony as evidence of negligence by Hilton but that the jury could consider the testimony as evidence on the issue of notice of the condition of the shower and tub.

If the accidents were dissimilar, as correctly held by the district court, then Oehmke's testimony concerning the first accident of Dr. Feuer was clearly inadmissible

under *Freed* to show *either* notice of a dangerous condition *or* negligence. The two accidents cannot be similar enough to show notice of a dangerous condition but not sufficiently similar to show negligence. *Freed* does not stand for such proposition. Under *Freed* Oehmke's testimony is clearly irrelevant. Because the testimony is irrelevant in the first instance, we need not reach the issue whether, if relevant, the testimony should be nonetheless excluded as hearsay. *See* Fed.R.Evid. 402 (all *relevant* evidence is admissible except as excluded by various listed exceptions including the hearsay rules.)

For the reasons stated above, we reverse the district court and remand for a new trial.

APPENDIX B

No. 87-1513

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CAROL PETTYJOHN, Plaintiff-Appellee, v. KALAMAZOO CENTER CORPORATION, d/b/a KALAMAZOO HILTON INN, A MICHIGAN CORP., Defendant-Appellant.	)	ORDER

(Filed Apr. 12, 1989)

Before: MARTIN, and NELSON, Circuit Judges; and EDWARDS, Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 87-1513

CAROL PETTYJOHN,

Plaintiff-Appellee,

v.

KALAMAZOO CENTER CORPORATION d/b/a KALAMAZOO HILTON INN, a Michigan Corporation,

Defendant-Appellant.

Before: *Martin* and *Nelson*, Circuit Judges; and *Edwards*, Senior Circuit Judge.

JUDGMENT

(Filed Feb 28, 1989)

ON APPEAL from the United States District Court for the Western District of Michigan.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby reversed and the case is remanded for a new trial.

IT IS FURTHER ordered that Defendant-Appellant, recover from Plaintiff-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said district court, if necessary.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

/s/ Leonard Green
Clerk

A True Copy.

Issued as Mandate:
April 20, 1989

Attest:

/s/ Tom Denningus
Deputy Clerk

COSTS: NONE

Filing fee.....$
Printing .....$

Total .....$

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CAROL PETTYJOHN,

Plaintiff,

vs. File No.: K 83 352 CA4

KALAMAZOO CENTER CORPORATION d/b/a KALAMAZOO HILTON INN, a Michigan Corporation,

Defendant.

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MONETARY JUDGMENT

(Filed Nov. 17, 1986)

This action came on for trial before the Court and a Jury, Honorable Benajmin F. Gibson, District Judge, presiding and the issues having been duly tried and the jury having rendered its verdict.

NOW, THEREFORE;

IT IS ORDERED AND ADJUDGED that Plaintiff, Carol L. Pettyjohn recover from the Defendant, Kalamazoo Center Corporation d/b/a Kalamazoo Hilton Inn the principle sum of $58,500.00.

IT IS FURTHER ORDERED AND ADJUDGED that the Plaintiff, Carol L. Pettyjohn shall be entitled to receive interest on the principle judgment amount at the statutory rate of twelve (12%) percent compounded annually from July 17, 1983 until the Judgment is satisfied by payment. The accrued interest as October 25, 1986 is $26,389.82.

IT IS FURTHER ORDERED that the Plaintiff shall be entitled to have costs taxed in this case, with the taxed costs to be added to the principle Judgment amount and the accrued interest, and the combined amounts are to bear interest at the rate of twelve (12%) percent compounded annually until satisfied by full payment.

/s/ Benjamin Gibson
Honorable Benjamin Gibson

APPROVED AS TO FORM:

/s/ Stephen Muhich
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CLERK

No. 89-55

In The

Supreme Court of the United States

October Term, 1989

CAROL L. PETTYJOHN,

Petitioner,

vs.

KALAMAZOO CENTER CORPORATION
d/b/a KALAMAZOO HILTON INN,
a Michigan Corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Issue: WHETHER THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY RELIED UPON MICHIGAN LAW WHEN IT CONCLUDED THAT EVIDENCE OF A PRIOR ACCIDENT IS NOT ADMISSIBLE TO SHOW NOTICE, WHERE THE ACCIDENTS WERE DISSIMILAR?

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No. 89-55

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Respondent, Kalamazoo Center Corporation respectfully requests that this court deny the Petition for Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Sixth Circuit in this case.

STATEMENT OF THE CASE

The Petitioner, Plaintiff below, Carol Pettyjohn, filed suit against the Defendant, Kalamazoo Center Corporation (hereinafter referred to as Kalamazoo Hilton), in the United States District Court of Michigan, Western District; jurisdiction was based upon diversity under 28 U.S.C. § 1332. The Petitioner alleged that the Kalamazoo Hilton was responsible for injuries that she suffered as a result of a slip and fall in the shower-tub combination in her hotel room at the Kalamazoo Hilton. She claimed that the Kalamazoo Hilton was negligent in failing to use reasonable care in the maintenance of the premises, that it breached its duty of an implied warranty of suitability and an implied warranty of merchantability. After a nine (9) day trial, the jury returned a verdict of $58,500 against the Kalamazoo Hilton. The Kalamazoo Hilton appealed to the United States Court of Appeals for the Sixth Circuit.

On appeal, the Sixth Circuit Court of Appeals reversed. *Pettyjohn v. Kalamazoo Center Corp.*, 868 F.2d 879 (CA6 1989). The Sixth Circuit Court of Appeals concluded that certain evidence was erroneously admitted and it reversed and remanded the matter to the trial court for a new trial. The Petitioner filed for a rehearing *en banc*, but that was denied. Petitioner now brings a petition for a writ of certiorari, seeking review by this Court.

For purposes of consideration by this Court, a number of facts will be set forth which were omitted by the Petitioner in her Statement of Facts.

Mrs. Pettyjohn slipped and fell in her hotel room shower-tub on August 19, 1980. After riding in an automobile for 23 hours, she and her companions checked

into the hotel. After her three companions showered, dressed and left the room, Pettyjohn used the shower-tub. She stepped into the shower, which had adhesive anti-slip strips. As water backed up, she backed up in the tub and in reaching to put the soap along the ledge of the tub, she fell, struck her arm and was injured.

At the trial, Pettyjohn attempted to have admitted certain testimony regarding a prior slip and fall which had allegedly occurred at the Kalamazoo Hilton. Pettyjohn introduced by deposition the testimony of an attorney, Thomas Oehmke, who represented one Dr. Feuer for purposes of writing a letter on his behalf regarding an alleged slip and fall in a shower-tub at the Kalamazoo Hilton in May, 1978. Oehmke, over the strenuous objections of the Kalamazoo Hilton, testified that Feuer told him that while Feuer was taking a shower, he fell in the shower-tub. Oehmke testified that Feuer told him that there were no adhesive strips when Dr. Feuer was there, and that no one else used the shower before him. The Kalamazoo Hilton claimed that all of this evidence was inadmissible hearsay; further, as described, the accidents were dissimilar in that the circumstances were different from the Plaintiff's circumstance as there were no anti-slip strips in the tub, no evidence of water backing up and no prior use of the shower.

The district court held that the accidents were in fact dissimilar and that the prior accident was not admissible for purposes of showing negligence. The district court, however, held that the accident was admissible as it pertained to the issue of notice of a hazardous condition and allowed Oehmke's testimony regarding Feuer's slip and fall to be considered by the jury. On appeal, the

Kalamazoo Hilton claimed such evidence was erroneously admitted.

The Sixth Circuit Court of Appeals agreed and reversed. The Court found that it was prejudicial error to admit evidence of a dissimilar, prior accident for the purpose of showing notice. The Court held that the district court misapplied a Michigan case, *Freed v. Simon*, 370 Mich 473, 12 N.W.2d 428 (1963), when it permitted evidence to be admitted for the purpose of showing that the Defendant had notice of a dangerous condition. *Pettyjohn* at 881. In Michigan, as in many other jurisdictions, evidence of prior accidents, if similar, may be used to show notice of a dangerous condition. See, generally, 21 A.L.R. 4th 472 (1983), and the cases cited therein.

The Court of Appeals noted that the district court ruled that the two accidents were not similar. The Court held that if the accidents were dissimilar, then testimony regarding the first accident was inadmissible either to show notice of a dangerous condition or negligence. *Id.* The Court concluded that Oehmke's testimony was clearly irrelevant and as such, it was not necessary to reach the issue whether, if relevant, the testimony should be nonetheless excluded as hearsay pursuant to Fed. Rule Evid. 402. *Id.* The Court then remanded the matter for a new trial.

The Petitioner now seeks a writ of certiorari before this Court.

SUMMARY OF REASONS WHY THE PETITION SHOULD BE DENIED

The decision of the Sixth Circuit Court of Appeals, in reversing and remanding this matter for a new trial, was eminently correct. The issue raised by the Petitioner is not meritorious, as, in diversity suits, it has been long recognized that state substantive law may impact on the evidence admitted by a federal district court. In this case, the question involved the admissibility of evidence of a prior accident to show notice of a dangerous condition. A review of the case law demonstrates that the federal courts consider state precedent on such issues as notice when considering the admissibility of evidence. There is nothing novel in that concept, and the Petitioner's argument that state law is to be wholly disregarded in diversity actions is plainly wrong.

Moreover, the Petitioner, in asserting that Federal law solely controls the admissibility of evidence in diversity suits, has failed to demonstrate that the result would have been different were that so. The Petitioner has set forth no case law, or any other authority, for the proposition that notice of a dangerous condition may be proven by the admission of evidence of a dissimilar, prior accident. There is no case authority for that proposition, and the Petitioner sets forth no reason why this Court should make such a radical departure from established case law. Thus, the Petitioner has not shown that even if her contention were correct, that it would mandate a different result.

Further, the Petitioner ignores the fact that the evidence which was admitted into trial was inadmissible hearsay. The Sixth Circuit did not rule on the issue, as it

was not necessary, and the Petitioner has failed to demonstrate that this evidence was properly admitted. Again, there is no showing that Petitioner would ultimately prevail, even if she prevailed on the issue which has been raised.

Finally, as a matter of policy, the petition should be denied. Review by granting the writ of certiorari should be sparingly exercised, and should only be utilized in those cases of significant gravity and general applicability. See, Sup. Ct. Rule 17, *Forsyth v. Hammond*, 166 U.S. 506 (1897). The argument raised by the Petitioner is without merit and does not meet that standard. This Court should refuse to exercise its jurisdiction in this case.

ARGUMENT

I. THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY RELIED UPON MICHIGAN LAW WHEN IT CONCLUDED THAT EVIDENCE OF A PRIOR ACCIDENT IS NOT ADMISSIBLE TO SHOW NOTICE, WHERE THE ACCIDENTS WERE DISSIMILAR.

The Petitioner argues that the decision of the Sixth Circuit Court of Appeals constitutes a rewriting of the Federal Rules of Evidence and that the Sixth Circuit Court of Appeals misapplied *Erie v. Tompkins*, 304 U.S. 64 (1938) when it utilized Michigan law. A reading of the decision does not impel such a conclusion. On the contrary, the Sixth Circuit Court of Appeals properly concluded that evidence of a prior accident where the facts are dissimilar is not admissible to show either notice of a

dangerous condition or negligence. Such a finding by the Sixth Circuit Court of Appeals does not rewrite or overrule the Federal Rules of Evidence. The decision of the Sixth Circuit Court of Appeals was correct, and the petition for writ of certiorari should be denied.

The question raised by the Petitioner is whether the Sixth Circuit Court of Appeals should have considered *Freed* at all. Petitioner asserts that the Court of Appeals could not rely upon state law to guide its consideration regarding the issue of notice when evidence of prior accidents is introduced in diversity actions brought in the federal courts. While the Petitioner's argument begs the question whether under the Federal Rules of Evidence, dissimilar accidents may be used as evidence to show notice of a dangerous condition, the Petitioner nonetheless asserts that reliance on state law is misplaced as it relates to the applicability and evidentiary value of prior accidents and the issue is solely governed by the Federal Rules of Evidence. A review of the case law, however, does not support the position of the Petitioner.

It is axiomatic that in a diversity action, state substantive law is to be applied by the district court. See *Erie*. It is also true that the procedural rules to be used in diversity actions are controlled by federal law. See *Hanna v. Plumer*, 380 U.S. 460 (1965). The issue arises when federal procedure is impacted by the state substantive law. While the Federal Rules of Evidence clearly set forth the procedure under which evidence is to be admitted in federal court, it does not necessarily follow that state law

is to be disregarded. In diversity actions, state substantive law may impact upon what evidence is to be admitted. This has been a long recognized concept, and it plainly covers the situation in the case at bar.

The issue of admissibility of prior accidents in federal cases has most often arisen in cases involving accidents at railroad crossings. Federal courts, subsequent to the enactment of the Federal Rules of Evidence, have looked to state law when considering whether prior accidents, which occurred at the same railroad crossings, may be admitted for purposes of showing notice of a dangerous condition. See, *Young v. Illinois Cent. Gulf R. Co.*, 618 F.2d 332, 339 (CA5 1980), where the court looked to Mississippi law, *Gardner v. Southern R. Systems*, 675 F.2d 949, 952 (CA7 1982), where the court looked to Indiana law, and *Lerner v. Seaboard Coast Line R. Co.*, 594 F.Supp. 973 (SD N.Y. 1984) and *Roundtree v. Seaboard Coast Line R. Co.*, 418 F.Supp. 220, 223 (MD Fl., 1976), where the courts looked to Florida law.

Prior to the enactment of the Federal Rules of Evidence, the courts looked to the law of the state when determining whether such evidence of prior accidents is admissible. See, *Southern Railway Co. v. Lanham*, 403 F.2d 119, 133 (CA5 1968); *DiFrischia v. New York Central R. Co.*, 307 F.2d 473, 476 (CA3 1962); *Nelson v. Brunswick Corp.*, 503 F.2d 376, 380 (CA9 1974).

It does appear, prior to *Erie*, that while the case of *Swift v. Tyson*, 16 Pet. (41 U.S.) 1 (1842) controlled, that certain federal courts concluded that the issue of admissibility of prior accidents at the same railroad crossing was controlled by Federal law. See *Evans v. Erie R.Co.*, 213

F. 129, 133 (CA6 1914). Since *Erie*, however, federal courts have generally considered the applicability of state law in evaluating the issue. See, *DiFrischia; Illinois Cent. R. Co. v. Sigler*, 122 F.2d 279, 283 (CA6 1941); *Jones & Laughlin Steel Corp. v. Matherne*, 348 F.2d 394, 400 (CA5 1965).

The rationale for looking to state law regarding certain evidentiary issues was set forth in *Conway v. Chemical Leaman Tank Lines, Inc.*, 540 F.2d 837 (CA5 1976). The Court considered the admissibility of certain evidence (in that case, evidence of the ceremonial remarriage of the Plaintiff) in a wrongful death action. In considering the impact of state law, the Court stated:

> In such and similar circumstances, federal courts have long recognized an exception to the inapplicability of *Erie* to evidentiary questions:
>
> > Although, as has been indicated, the courts have held the Erie doctrine inapplicable on questions of evidence, other than those of privilege, it must be remembered that some matters often thought of as part of the law of evidence are not governed by Rule 43( ). Burden of proof is an issue of substance, controlled in diversity cases by state law. The misnamed "parol evidence rule" is not a rule of evidence at all but of substantive law, and state law must be applied. *Finally, there are circumstances in which a question of admissibility of evidence is so intertwined with a state substantive rule that the state rule excluding the evidence will be followed in order to give full force to the state's substantive policy.* 9 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2405, at 326-27 (1971). (Emphasis supplied).

Id. at 839.

As it pertains to certain evidentiary issues, state law plainly impacts upon the type and nature of evidence which may be considered by a jury in a diversity action.

This was also the conclusion reached in *In Re Air Crash Disaster Near Chicago, Ill.*, 701 F.2d 1189, 1193 (CA7 1983), wherein the Seventh Circuit Court of Appeals held:

> It does not follow, however that state evidence rules have no bearing on what evidence is admissible in federal court, for the relevance of the evidence is ascertainable only by reference to the substantive law of the state. To the extent that the state evidentiary rule defines what is sought to be proved – here, the measure of damages – it may bind the federal court under *Erie* principles.

Further, it is clear from the legislative history of the Federal Rules of Evidence that Congress was sensitive to the impact of state law regarding evidentiary issues. See, for example, the House Judiciary Committee report on the issue of privilege and competency, H.R. 93-650, 28 U.S.C. App., p. 644-645. Where the claim or defense was grounded in state law, federal interest was insufficient to justify the departure from state policy.

Such considerations are applicable in the case at bar. In a diversity action sounding in tort, state case law on the admissibility of evidence regarding prior accidents is relevant to a district court's determination of admissibility. The fact that this was recognized by the Court of Appeals in the case at bar does not imply, as argued by the Petitioner, that the Court has held that state law governs the admissibility of evidence in federal courts. Rather, it is a recognition that there may be certain instances where there is no compelling reason for the

federal policy to override or modify substantive state law. If there were instances in which the Federal Rules permitted the admission of significantly different evidence on the same issue when compared to state courts, that would promote the type of forum shopping which appears to have concerned Congress when it initially enacted the Federal Rules of Evidence. See, H.R. 93-650, 28 U.S.C., App., p. 644-645. Consideration of state law and policy is entirely appropriate when considering what type of evidence should be admitted as evidence in diversity actions.

The Sixth Circuit Court of Appeals appropriately considered *Freed* as relevant to the district court's determination, and concluded, correctly, that the district court had misread it. The decision of the Sixth Circuit Court of Appeals is correct and the writ of certiorari should be denied.

II. THERE IS NO AUTHORITY FOR THE PROPOSITION THAT A DISSIMILAR, PRIOR ACCIDENT MAY BE ADMITTED TO SHOW NOTICE OF A DANGEROUS CONDITION, AND THERE IS NO SHOWING THAT THE RESULT WOULD BE DIFFERENT IF THE ISSUE WERE SOLELY CONTROLLED BY FEDERAL LAW.

The Petitioner has cited no authority for the proposition that under the Federal Rules of Evidence, a prior accident, determined to be dissimilar in time and circumstances, may nonetheless be used as evidence of negligence, or as evidence placing the defendant on notice of a

dangerous condition. The Petitioner argues that the accidents were "somewhat similar". (Petitioner's Brief, p. 5) The trial court found differently, ruling that the accidents were dissimilar, and that finding was determined to be correct by the Sixth Circuit Court of Appeals. *Pettyjohn* at 881. For there to be any modification in the decision of the Sixth Circuit Court of Appeals, this Court must thus find either, as a matter of factual determination, that the accidents were similar or that under the Federal Rules of Evidence, prior accidents dissimilar in circumstances are admissible to show notice of a dangerous condition.

The Petitioner has made no request that this Court reevaluate the factual determination of dissimilarity made and affirmed by the Courts below. Therefore, in order for the Petitioner to prevail, this Court must rule that as a matter of federal evidentiary policy, it is not necessary to show that the prior accident was similar in circumstances when laying the foundation to admit evidence of a prior accident to show notice of a dangerous condition. There is, however, no basis for making such a ruling.

First, as noted before, there is no case support for such a proposition, and none has been cited by the Petitioner. Secondly, as a matter of logic, the proposition makes no sense. As stated by the Sixth Circuit Court of Appeals, it is illogical to conclude that a dissimilar prior accident places one on notice regarding the cause of a subsequent accident. It simply does not follow. Those federal courts which have considered the issue of the admissibility of evidence of prior accidents examine the generally accepted requirements of similarity in time and circumstance in order to guide their determination. See,

Young at 339; *Jones & Laughlin* at 400-401; *Roundtree* at 233; *DiFrischia* at 476.

The rationale for limiting the evidence to similar accidents is clear. It is only logical to require that there must be some showing that the same cause existed to produce the subsequent accident. Otherwise, the admission of unrelated accidents would only serve to prejudice the defendant and bring collateral issues before the trier of fact. Indeed, even in these cases where the accidents are similar, a balancing of the probative value, in relation to the prejudice, needs to be made. As set forth by the Ninth Circuit Court of Appeals:

> But whether to admit such evidence is a matter generally for the trial court to decide, keeping in mind the collateral nature of the proof, the danger that it may afford a basis for improper inferences, the likelihood that it may cause confusion or operate to unfairly prejudice the party against whom it is directed and that it may be cumulative, etc. *McCormick, Supra* at 473.

Nelson at 380.

Courts consider whether the evidence of the prior accident is relevant (that is, similar), and then consider whether, if so, its probative value is outweighed by the potential prejudice. See, *Gardner*, at 952; Fed. Rule Evid. 403; 21 A.L.R. 4th 472, 484 (1983) and the cases cited therein.

It can be seen that there is no basis for finding that the Court of Appeals erred in making its ruling. Once it was determined that the accidents were dissimilar, whether under state or federal law, evidence of the prior accident is inadmissible. The Sixth Circuit Court of

Appeals did not err, and the petition for writ of certiorari should be denied.

There is one final point. Because it was not necessary, the Sixth Circuit Court of Appeals did not decide whether the testimony should nonetheless be excluded as hearsay. It is clear that Oehmke, the attorney, cannot testify regarding what a non-party client told him, regarding events for which Oehmke did not observe. As set forth in Fed. Rule Evid. 801 (c), hearsay is:

> "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

Unless otherwise provided by rules of this Court, or by act of Congress, hearsay is not admissible. See, Fed. Rule Evid. 402, 802.

The statements of Oehmke relating what Feuer told him regarding an alleged slip and fall are not admissible, as those statements are classic hearsay. The Petitioner sought to use throughout the trial the testimony that Feuer slipped in a showertub at the Hilton Hotel and that the Respondent was placed on notice of a dangerous condition. Testimony by Oehmke introduced at trial regarding what Dr. Feuer said was plainly inadmissible.

Thus, in order for the Petitioner to prevail, she must demonstrate that not only did state law not apply and that the Federal Rules of Evidence would compel a different result, but that the hearsay testimony was admissible. No such showing can be made. The Petitioner cannot show that reversing the Sixth Circuit Court of Appeals on

the issue raised will change the result. Under such circumstances, the petition for writ of certiorari should be denied.

CONCLUSION

The Sixth Circuit Court of Appeals properly concluded that inadmissible evidence was admitted at trial, which prejudiced the defendant and required a reversal and a remand for a new trial. For the reasons set forth above, the Kalamazoo Hilton respectfully requests that the instant petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit be denied and that Respondent be awarded appropriate damages pursuant to Rule 49.2 of the Rules of the Supreme Court on the grounds that the instant petition is clearly frivolous.

Respectfully submitted,

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DATED: August 4, 1989

APPENDIX

LIST OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES, PURSUANT TO RULE 28.1.

The Defendant Kalamazoo Center Corporation d/b/a Kalamazoo Hilton is a wholly owned subsidiary of the Corporation Inland Steel Industries, Inc. It is affiliated with other corporations, but those corporations are all wholly owned subsidiaries of Inland Steel Industries, Inc.

There is, however, an additional corporation which is publicly owned and not a party to this appeal, but that has a financial interest in the outcome. That corporation is the SAFECO Corporation which has the following subsidiary companies:

PROPERTY AND CASUALTY

SAFECO Insurance Company of America
General Insurance Company of America
First National Insurance Company of America
SAFECO National Insurance Company
SAFECO Insurance Company of Illinois
SAFECO Surplus Lines Insurance Company
F.B.Beattie and Co., Inc.

LIFE AND HEALTH

SAFECO Life Insurance Company
SAFECO National Life Insurance Company
SAFECO Administrative Services, Inc.

REAL ESTATE

SAFECO Properties, Inc.
Winmar Company, Inc.
SAFECARE Company, Inc.
SAFECARE Health Services, Inc.

OTHER

SAFECO Credit Company, Inc.

SAFECO Securities, Inc.
SAFECO Asset Management Company
SAFECO Services Corporation
PNMR Securities, Inc.

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No. 89-55

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Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

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AUTHORIZATION FOR PETITIONER'S REPLY BRIEF

The rules of the Supreme Court of the United States, adopted June 15, 1970, effective July 1, 1970, and as amended to March 1, 1975 and thereafter, provide pursuant to Rule 24(3) & (4) that the petition and brief shall be distributed by the Clerk of the Court for consideration and a reply brief addressed to arguments first raised in the brief in opposition may be filed, but there will be no delay in distribution pending the filing of such brief.

SUMMARY OF PETITIONER'S REPLY TO ARGUMENTS RAISED IN RESPONDENT'S OPPOSING BRIEF

The essence of the Petition for Writ of Certiorari is issues of choice of law in the federal courts, the authority of the United States Congress to establish rules of evidence for the federal courts, and the right of trial courts in diversity cases to make discretionary determinations on the relevancy and admissibility of evidence called for by those rules. The holding of the Sixth Circuit Court of Appeals is that the U.S. District Court for the Western District of Michigan incorrectly applied *Freed v. Simon*, 370 Mich 473; 122 NW2d 813 (1963), and thereby admitted evidence of Dr. Feuer's prior accident. This evidence was determined by the Sixth Circuit Court of Appeals to be clearly inadmissible under *Freed*. The trial court, a federal district court in a diversity action, determined that this evidence was relevant and admissible for the limited purpose of showing notice of the unsafe or dangerous condition.

The specific question presented is:

> "Whether federal courts in diversity of citizenship cases are to use state substantive law rather than the Federal Rules of Evidence to make determinations on the relevancy and admissibility of evidence."

What is the Respondent's answer to the question presented for review? It is neither clear nor is it discernible! It appears to be an avoidance of a direct answer or statement of position as to the question asked.

The Respondent makes broad reference to the impact that state substantive law may have on evidence and that federal courts consider state precedents on issues related to the admissibility of evidence. However, directing attention to these general concepts does not reply to the question presented. The Petitioner asserts that the Court of Appeals erred by reversing the trial court on a question of relevancy and admissibility of evidence. The error was its interpretation of a state court evidentiary holding on a federal evidentiary issue. The trial court ruling was correct, based on the Federal Rules of Evidence and federal case law pertinent to issues of relevancy and admissibility.

Does the Respondent contend that state substantive law is to be used to decide the relevancy and admissibility of evidence in federal court diversity of citizenship cases? Does it contend that the relevancy and admissibility of the testimony is other than a federal court evidentiary question? Does it contend that the Court of Appeals decided the relevancy and admissibility issue under federal law, even though it stated that the trial court incorrectly applied the state court holding? Does it contend that the Court of Appeals used a federal law basis for the opinion it rendered?

These four (4) subsidiary questions fairly comprise the areas for challenge to the Petitioner's position. None of them make up the Respondent's opposition. These are neither answered nor addressed. That which is presented amounts to obtuse discourse and fails to deal with the essence of the important issue involved.

If the Court of Appeals did not base its decision on state law, then this petition should be dismissed as unfounded. However, its opinion specifically states that the District Court erred in admitting testimony, by incorrectly applying state law. No other basis is given for the holding! If Respondent actually agrees that the Federal Rules of Evidence, not state law, control determinations about relevancy and admissibility, then the Petitioner should be granted the relief requested.

This controversy focuses on the law to be used for deciding evidentiary questions in a diversity case. The Respondent asserts that state law might have an impact or be of persuasive value when a federal trial court is asked to determine the relevancy and decide the admissibility of evidence. Such argument is indicative of an effort to sidestep the questions presented. If the intent were otherwise, the Respondent would have clearly declared its position on applicability of the Federal Rules of Evidence or state substantive law. Instead, it equivocates, contending that the Court of Appeals merely considered rather than decided the issues of relevancy and admissibility based on state law.

The obfuscation and inability of the Respondent to pick a position tends to highlight a lack of clear understanding of the question presented. It is one of great significance and importance to general federal jurisprudence. The United States Supreme Court should take jurisdiction over this case and enter an order granting the Writ of Certiorari to review the decision of the Sixth Circuit Court of Appeals.

ARGUMENT

I

THE SIXTH CIRCUIT COURT OF APPEALS ERRONEOUSLY USED STATE LAW RATHER THAN THE FEDERAL RULES OF EVIDENCE WHEN DETERMINING THAT THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR IN DECIDING THAT THE EVIDENCE OF THE PRIOR ACCIDENT WAS RELEVANT AND ADMISSIBLE TO SHOW NOTICE OF AN UNSAFE OR DANGEROUS CONDITION.

The opinion of the Court of Appeals unequivocally provides that it found reversible error because "the District Court incorrectly applied *Freed v. Simon*, 370 Mich 473; 122 NW2d 813 (1963)." It further opined, "Oempke's testimony concerning the first accident of Dr. Feuer was clearly *inadmissible* under FREED to show either notice of a dangerous condition or negligence." Slip Op, p.3. (Petition, Appendix A.) It is irrefutable, despite protestations to the contrary, that the Court of Appeals decided this relevancy and admissibility issue in accordance with its interpretation of state law on relevancy and admissibility.[1]

What were the facts and issues before the District Court for decision on the basis of relevancy and admissibility? How did the District Court evaluate the facts and circumstances and decide the issues presented? On what

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[1] Even its interpretation of how the issue would be decided under state law was incorrect. Besides the case in question not standing for the proposition for which it was cited, it is also not the applicable law on point. The Michigan Rules of Evidence (MRE) enacted in 1978, well after the holding in the case relied upon, parallels the Federal Rules of Evidence (FRE) and operates on the presumption favoring the admissibility of evidence. MRE Rule 401-403.

basis did the District Court reach its ruling on the relevancy and admissibility of evidence? This important trilogy of questions, when looked at and answered, show the correctness of the trial court's thinking and its decision on the relevancy and admissibility question it faced.

The excerpt from the trial court record selected by the Court of Appeals for its opinion warrants careful review and consideration to recognize the significant aspects of the trial court ruling. Slip Op, p. 3, supra. One thing the trial court *did not* say was that the two (2) accidents were dissimilar.[2] Instead, it determined that the conditions giving rise to the two (2) accidents were not the same, because of identifiable dissimilarities[3] of the conditions giving rise to each of the accidents. The trial court discerningly considered the respective conditions, determined them to be similar but "not sufficiently similar that the testimony should be used as evidence of negligence ***". [TR Vol. II, p. 509] Then, using its authority and discretion to control the evidence submitted in a case, the trial court ruled that although not sufficiently similar to be permitted as evidence of negligence, it was relevant to show notice of the unsafe or dangerous condition. That was the limited purpose for which the trial court allowed it to be used. [TR Vol. II, p. 526]

The trial court addressed numerous challenges, at different stages of the trial proceedings, to the admissibility of this evidence. In addressing the preliminary question of admissibility, the trial court found that the foundational facts were sufficient to show it to be relevant or legally helpful to the jury in making a factual determination on liability. However, the trial court urged the Defendant to bring forth any evidence that it had to

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[2] Dissimilar: an adjective meaning different, *Webster's II New Riverside University Dictionary*, Riverside Publishing Co., Houghton Mifflin Co., Boston, MA (1984), p. 389.

[3] Dissimilarities: a plural of the noun meaning points of difference. *Webster's II New Riverside University Dictionary*, id.

challenge the Plaintiff's offer of proof, if it believed those representations to be inaccurate. [TR Vol. I, p. 77]

After all of the evidence was presented, the trial court made a final determination on this relevancy and admissibility of evidence question. It found that the evidence had a logical basis for showing that the Defendant was on notice about the unsafe or dangerous condition at its premises. It allowed the use of the testimony for that limited purpose. [TR Vol. II, p. 526] This affirmative determination, as to the relevancy of the evidence, was the condition precedent to its admission in accordance with FRE 401. In making its final decision, the trial court carefully took into consideration the extent to which the two (2) accidents were similar. Then, in the employment of its discretion, it did not permit the evidence to be used to show negligence. It permitted it to be used only for the purpose of showing notice of the unsafe or dangerous condition.

This ruling is consistent with the well-recognized, broad-scoped authority of a trial court to control evidence presented at trial. In *Gumbs v. International Harvester, Inc.*, 718 F2d 88, 97-98 (C.A. 3, 1982), this proposition was set forth as follows:

> "The Trial Judge has wide discretion to admit or exclude evidence under Federal Rules of Evidence. J.H. Wigmore, 2 Evidence Sec. 444 (Chadbourn, Rev. 1979); McCormick Evidence Sec. 200 (2 ND 1972). However, for the evidence to be relevant, there must be some logical relationship with the proffered evidence and the theory of the case. The plaintiff has the burden of establishing sufficient similarity between the accident and his own theory of how the accident occurred, so admission of the evidence of other accidents will make the existence of any fact of consequences to the determination more probable than it would be without the evidence. Federal Rules of Evidence 401."

It is generally well-settled in the federal courts, and has been held by the Sixth Circuit Court of Appeals, that testimony of other accidents in the same place are admissible to show notice of the dangerous character of the place or as evidence of defendant's negligence. *Staler v. Penn Central Transp. Co.*, 583 F2d 896, 898 (C.A. 6, 1978); 21 ALR4th 472, 479; n10. This Circuit has held that evidence of other accidents can be admitted to show design defects. *Rimer v. Rockwell International*, 641 F2d 450, 456 (C.A. 6, 1981).

The Sixth Circuit Court of Appeals has held that evidence of similar accidents, and even the lack of prior claims, is relevant as to the issue of actual or constructive knowledge of dangerous propensities. *Kolanda v. General Motors Parts Div., General Motors Corp.*, 716 F2d 373, 377 (C.A. 6, 1983). This is the trend of decisions in a majority of jurisdictions. They generally favor the admissibility of evidence of other accidents. *McCormick, Evidence Ed.*, Sec. 200 (E. Clary Ed., 1972); 29 AmJur2d *Evidence*, Sec. 310.

A trial court is invested with broad discretion in deciding evidentiary questions. It is to draw on its own experiences, in the affairs of mankind, when evaluating the probabilities upon which relevancy depends. *U.S. v. Williams*, 545 F2d 47, 50 (C.A. 8, 1976). The Sixth Circuit Court of Appeals ignored the admonition that, absent the showing of a clear abuse of discretion, trial court rulings on relevancy and materiality are not to be disturbed. *U.S. v. Ashley*, 555 F2d 462, 465 (C.A. 5, 1977), *cert denied* 434 U.S. 869; 98 S. Ct. 210; 54 L. Ed. 2d 147.

The Court of Appeals did not indicate any failure by the trial court to make the discretionary decision required of it. It did not find an incorrect application of the Federal Rules of Evidence! However, there was an apparent dislike for the choice made by the trial court for that discretionary decision.

The appellate decision in this case, by placing reliance on its interpretation of state law, eludes direct conflict with the Federal Rules of Evidence on relevancy

and admissibility. However, the objective sought to be accomplished was achieved through application of wrong legal standards. It has resulted in an erroneous legal precedent. It will only cause substantial confusion for trial attorneys and judges, and will lead to the development of erroneous interpretations about the law to be applied for rulings on evidentiary matters in diversity of citizenship cases.

II

THE SIXTH CIRCUIT COURT OF APPEALS DETERMINED BY ITS RULING THE EXISTENCE OF ONLY A SINGULAR BASIS FOR REVERSAL OF THE TRIAL COURT VERDICT AND JUDGMENT WITH REMAND FOR A NEW TRIAL.

The Defendant attempts to tilt the balance against granting this request for relief by dangling diversionary non-issues. It acknowledges that the Court of Appeals did not decide that any other issue was of sufficient import to warrant reversal. The Respondent attempts to reconcile this inaction with speculative plausibility.

Despite the Federal Rules of Evidence clearly being the standard to be used in determining issues of relevancy and admissibility, the Respondent being unable to identify precedent to the contrary, it still hopes to avoid a full review in this Court by suggesting the remote possibility that a different result is precluded for other reasons. If that diversion or ploy is to prevail, then the erroneous federal precedent of this case will subsist and haunt federal jurisprudence until this Court is offered another opportunity to settle the issue and rectify the abounding damage.

The non-issue of inadmissible hearsay, alluded to by the Respondent, was briefed and argued in the Court of Appeals. The Respondent failed to advise this Court that the testimony of Oempke, relating to Dr. Feuer's version of the accident, was specifically elicited by the Respondent. It put it into evidence on cross examination. It

happened at the de bene esse deposition of Oempke on August 27, 1985. The answer to their questions requesting hearsay obviously came back different than expected. At the September, 1985 trial, it objected to that testimony and moved to have it stricken. The court denied the motion. [TR Vol. I, pp. 70-84]

On appeal, it was demonstrated that the Respondent had asked questions calling for obvious hearsay. It was then pointed out that when a party asks a question calling for hearsay and the answer is responsive, the right to object is waived. 1 *Wigmore, Evidence*, 3rd Ed., 1940, Sec. 18, p. 344. Similarly, in *Rucker v. Wabash Railroad Co.*, 418 F2d 416; 453 n6 (C.A. 7, 1969), a hearsay objection was disallowed. The evidence was not permitted to be challenged on appeal because the attorney's cross examination sought the hearsay response. The hearsay objection was deemed to be waived! Hence, in this case there is no holding by the Court of Appeals that there should be a reversal of the verdict and judgment, with remand to the trial court, on the basis of inadmissible hearsay.

It is clear that the Respondent wants a retrial, and wants it without any testimony on the prior accident. It wants that result, even though it is clear that the trial court found that both accidents were "sufficiently similar" to be relevant and have probative value to show notice of an unsafe or dangerous condition. Sensing some advantage gained by the erroneous appellate ruling, if it can get this Court to refuse to take jurisdiction, it will attempt to exclude Dr. Feuer's testimony as irrelevant and therefore inadmissible under the "law of the case" doctrine.

This position has already been espoused by Respondent in response to Petitioner's Motion for Leave to Take Deposition During Pendency of Appeal. The Petitioner seeks to avoid the further compounding of injustice along the exasperating course of litigation to obtain compensation for permanent and debilitating injury sustained at the hands of this financially disparate opponent. This can

be ameliorated by the Supreme Court taking jurisdiction and granting the Petition for Writ of Certiorari.

CONCLUSION

The legacy of the case at bar, as it presently stands, is misdirection, confusion, and unnecessary future litigation on what should otherwise be an uncomplicated and well-established concept of federal jurisprudence. This case presents the United States Supreme Court with the opportunity to create precedent and remove from conflict and doubt an important concept of federal diversity jurisprudence. Therefore, the United States Supreme Court is urged to become involved and to exercise its power of supervision to definitively rule on this important question of federal jurisprudence.

Respectfully submitted,

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State of Michigan